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IN THE

SUPREME COURT OF THE UNITED STATES

SERGIO DURAN BADILLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. WHETHER THE FIFTH AND SIXTH AMENDMENT'S GUARANTEE OF DUE PROCESS, FAIR TRIAL AND JURY TRIAL IS VIOLATED BY A PERMISSIVE INFERENCE INSTRUCTION CONCERNING THE SOLE ISSUE BEFORE THE TRIER OF FACT

2. WHETHER THE TENTH CIRCUITS REFUSAL TO APPLY *BLAKELY v. WASHINGTON* VIOLATES MR. BADILLA'S 6TH AMENDMENT RIGHT TO TRIAL BY JURY

In this case, the Tenth Circuit affirmed a permissive inference jury instruction concerning the sole issue (of knowledge) in dispute and affirmed the imposition of a sentence enhancement (obstructing justice) by refusing to apply *Blakley v. Washington*, 124 S.Ct. 2251(2004) to Federal Sentencing Guidelines on Appeal. The permissive instruction violates the Fifth Amendments Due Process Right to fair trial, the Sixth Amendment Right to fair trial and jury determination, and Article III's implementation of the Court's supervisory powers over lesser courts to insure fair trial. As to the sentencing issue, the Sixth Amendment requires application of *Blakely* to Federal Sentencing Guidelines under a plain error review.

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No. _____

IN THE

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SERGIO DURAN BADILLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Sergio Duran Badilla requests this Court issue a Writ of Certiorari to review the judgment, decree and order of the Tenth Circuit Court of Appeals entered August 12, 2004 in appellate cause No. 03-2183.

Opinion and Orders Below

The published order, judgment and decision of the Tenth Circuit Court of Appeals in *United States v. Sergio Duran Badilla*, CA#03-2183 was filed on August 12, 2004 and is attached hereto as Appendix A.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and §210(c), to review the Judgment, Decree and Order of the Tenth Circuit Court of Appeals issued in this case on August 12, 2004. This Petition for Writ of Certiorari is mailed within 90 days of August 12, 2004; is timely filed; and is served pursuant to Rules 13(3) and 29(4), Rules of the Supreme Court of the United States.

Constitutional Provisions

1) Fifth Amendment to the United States Constitution provides in relevant part:

No person shall be deprived of life, liberty or property without due process of law;

2) Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury;

3) Article III, United States Constitution, §1, provides:

The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Statement of the Case

A) Facts

Mr. Badilla was indicted and convicted for knowingly and intentionally possessing more than 100 kilograms of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1) and (b)(1)(B)

and 18 U.S.C. §2. Mr. Badilla exercised his right to jury trial; he took the stand in his own defense and testified under oath that he had no knowledge of the 217 kilograms of marijuana, wrapped in 37 individual bundles and found in a hidden compartment which ran the length of his truck bed.

Mr. Badilla was the sole occupant of a pickup truck. The pickup truck was stopped at a Border Patrol Checkpoint near Truth or Consequences, New Mexico. After a K-9 alerted at a secondary checkpoint, a search was conducted and the marijuana discovered in the hidden compartment. The only issue (contested by Mr. Badilla at his trial) was whether or not he knew the marijuana was located in the secret compartment of his vehicle.

Over Mr. Badilla's objection, the Trial Court gave the following instruction:

> *With respect to the question of whether or not the Defendant knew that a controlled substant was present, you may-but are not required to-infer that the driver and sole occupant of the vehicle has knowledge of the controlled substance within it.*

In addition to the above instruction, the Court gave several more inference instructions including:

1. When knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of the high probability of its existence, unless he actually believes that it does not exist.

2. Knowledge can be inferred if the

> Defendant deliberately blinded himself to the existence of a fact that otherwise would have been obvious to him. [1]

At sentencing, the District Court Judge added an enhancement of two levels pursuant to U.S.S.G. §3C1.1. The Trial Court found Mr. Badilla willfully impeded or obstructed justice by denying his knowledge under oath at his trial and before the jury.

Although Mr. Badilla objected to the enhancement, he did not raise the issue recently resolved by this Court in *Blakely v. Washington*, 124 S.Ct. 2531(2004). Mr. Badilla's case was fully briefed by March 2004; argued in the first week of May, 2004 and decided approximately seven weeks after this Court's decision in *Blakely*. By Motion, Mr. Badilla requested the Tenth Circuit consider this Court's decision in *Blakely*; apply *Blakely* to United States Sentencing Guidelines; and vacate the enhancement. Since Mr. Badilla had not raised the *Blakely* issue at the District Court, the Circuit Court declined to reverse Mr. Badilla's sentence under plain error review. This matter was resolved in a footnote. See Appendix one.

B) Related Case

Mr. Badilla notes the existence of a second case, *United States v. Cota-Meza*, 367 F.3d 1218(10th Cir. 2004), before this Court on Petition for Writ of Certiorari from the Tenth Circuit on the same issue. In both decisions, the Tenth Circuit with two different panels sitting, noted that the permissive instruction in question was not a model of clarity and that the Court (Tenth Circuit) would not have chosen to so instruct a jury. The Tenth Circuit notes that permissive inference instructions have been roundly criticized for wrongfully influencing a jury. However, in both cases, the Tenth Circuit stated that "a permissive instruction is valid if there is a rational connection

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[1] Mr. Badilla only objected to the italicized instruction. Supra. All instructions can be found in Appendix two.

between the fact that the prosecution proved and the ultimate fact presumed, and the latter is more likely than not to flow from the former". Both cases permit the Trial judge to make the threshold decision concerning "more likely than not". Both cases see no constitutional impediment to the giving of the instruction citing *Ulster County v. Allen*, 442 U.S. 140(1979). The Tenth Circuit declined to use its supervisory powers to exclude the permissive inference instruction in cases where the inference goes to the only issue before the trier of fact.

Reasons for Granting the Petition-Writ

1. Conflict with Ninth Circuit – Permissive Inference Instruction, Not Permitted

The Ninth Circuit has considered, rejected and determined that the permissive inference instruction given in this case is reversible error. *United States v. Rubio-Villareal*, 967 F.2d 294(9th Cir. 1992). After raising Fifth and Sixth Amendment issues, the Ninth Circuit based its decision upon the exercise of its supervisory authority. There is a direct conflict with the Tenth Circuit.

2. Conflict with Fifth Circuit – Inference Not Permitted

In direct conflict with the Tenth Circuit, the Fifth Circuit holds knowledge of a controlled substance (present in a vehicle) may not be inferred from exclusive control over the vehicle if the substance is located in a hidden compartment. *United States v. Diaz-Carreon*, 915 F.2d 951(5th Cir. 1990), *United States v. Ortega-Reyna*, 148 F.3d 540(5th Cir. 1998). See also, *United States v. Anchondo-Sandoval*, 910 F.2d 1234(5th Cir. 1990). The circuit has determined that the threshold question of "more likely than not", is a jury question that should be resolved without judicial interference.

3. Conflict with Third Circuit – Inference Not Permitted

The Circuit holds that constructive possession of a vehicle

containing contraband, standing alone, is not sufficient to prove guilt knowledge and constructive possession. *United States v. Iafelice*, 978 F.2d 92(3rd Cir. 1992).

4. Conflict with the Ninth Circuit: *Blakely* plain error

In *United States v. Ameline*, No. 02-30326(9th Cir. Filed July 21, 2004) the Ninth Circuit determined that a *Blakely* error was plain error, affecting substantial rights and prejudicing the Defendant. Consideration for the first time under appeal for plain error is proper. *Ameline* is in direct conflict with *Badilla*.

Argument for Allowance of Writ

1. THE FIFTH AND SIXTH AMENDMENTS' GUARANTEE OF DUE PROCESS, FAIR TRIAL AND JURY TRIAL IS VIOLATED BY A PERMISSIVE INFERENCE INSTRUCTION CONCERNING THE SOLE ISSUE BEFORE THE TRIER OF FACT

An important question of constitutional law concerning permissive inference instructions (first addressed in *Ulster County v. Allen*, supra) has not been settled. In *Ulster County*, this Court held that permissive instructions do not implicate the due process clause as defined by the Fourteenth Amendment. The Court has not considered whether permissive inferential instructions violate either the Fifth Amendment right to due process and fair trial, the Sixth Amendment right to fair trial and jury trial, or whether the Courts supervisory role requires reconsideration and clarification of its *Ulster County* holding.

A string of recent Supreme Court cases including *Apprendi v. New Jersey*, 530 U.S. 466(2000); *Ring v. Arizona*, *536 U.S. 584(2002)*; and *Blakely v. Washington*, supra, have recently identified this Court's desire to protect jury determination of all issues concerning guilt and punishment. The permissive inference instruction interferes with jury determination.

The only reason to give the inferential instruction on knowledge in Mr. Badilla's case was to assist the government in proving the sole element in dispute. The instruction permits the judge to tell a jury what it can infer. The judge tells the jury that it can not ignore the Court's instructions on law. This Court has continuously held that the government must prove every element of an offense and any type of instruction violates due process if it reduces the government's burden. *In re: Winship*, 397 U.S. 358(1970); *Sandstrom v. Montana*, 442 U.S. 510(1979); *Ulster County v. Allen*, supra. A permissive inference is designed to reduce the governments burden and violates due process right to fair trial as guaranteed by the Fifth and Sixth Amendment.

In *Ulster County v. Allen*, this Court upheld permissive inferences under the due process clause of the Fourteenth Amendment as long as it can be said with substantial assurance that the inferred fact is more likely than not to flow from an approved fact on which it is made to depend. In *Ulster* the Supreme Court gave no direction as to how to determine whether an inferred fact is more likely than not to flow from an approved fact. This Court permitted trial judges to become gate keepers concerning "more likely than not". The Court went on to say that some presumptive inferences may still constitute a violation of the Fourteenth due process clause and prohibition against judicial comment if it has the effect of shifting the burden of proof to the Defendant in any manner.

The gate keeper function interferes with a jury's exclusive right to weigh facts. Traditionally the "gate keeper function" of a trial court was limited to the existence of facts. Trial Courts were asked to determine if facts exist that would support a prosecution or defense. Once the Courts make that decision, it is up to the jury to weigh facts against a burden of proof standard. When the Court weighs facts in criminal cases, it violates Sixth Amendment right of jury determination. Weighing is not the function of a neutral judicial officer when a jury has been impaneled.

This Court must review how its ruling in *Ulster* is being applied. The twenty five years that have passed since *Ulster*. During this time, Federal Courts have been reticent to give permissive inference instructions. Petitioner can find no other circuit that approves the permissive inference instruction given in this case and grudgingly approved by the Tenth Circuit. While the Tenth Circuit applies *Ulster County* broadly, all other circuits seek to narrow its application raising both 5th and 6th Amendment objections.

The danger of a permissive inference highlights 5th and 6th amendment issues. The instruction focuses the jury on one fact (sole possession of a motor vehicle) rather than the totality of evidence. In a one issue case, it gives undue judicial emphasis to a particular piece of

evidence. It permits a trial judge and not a jury to determine that an inferred fact is more likely than not to flow from a proven fact. It violates the defendant's Sixth Amendment Right to fair trial and trial by an impartial jury.

In Mr. Badilla's case, the jury was told by a judge that they may, but were not required to, infer that the driver and sole occupant of the vehicle had knowledge of the controlled substance within it. The instruction permits a judge to comment on how to apply the law. To say the jury is not required by the instruction to infer, begs the issue of how a jury reacts to judicial instructions that they are ordered generically to follow. The instruction reduces the government's burden of proof. The sole intent of the instruction is to reduce and assist the government in its burden of proof. It allows for the government to rely upon the instruction to prove its case. It reduces jury fact finding.

Petitioner is requesting this Court reevaluate its Fifth Amendment Due Process constraints concerning fair trial and judicial comment. The Defendant requests the Court apply the Sixth Amendment prohibition on judicial comment and guarantee fair trial and jury trial to prohibit permissive instructions where it concerns the sole issue in a case. Finally Petitioner requests the Court exercise the Court's supervisory authority and reject these types of permissive inferences in cases that constitute judicial comment on evidence concerning sole issues of fact before the jury.

2. THE TENTH CIRCUITS REFUSAL TO APPLY *BLAKELY v. WASHINGTON* VIOLATES MR. BADILLA'S 6TH AMENDMENT RIGHT TO TRIAL BY JURY

The Tenth Circuit refused to apply *Blakely v. Washington* to Badilla's enhancement for obstructing justice, claiming plain error review precluded relief. The Tenth Circuit found a *Blakely* Sixth Amendment violation is not plain error. The Ninth Circuit on the other hand, determined in *Ameline*, supra, that a *Blakely* error is plain error requiring review by an appellate court. In *Ameline*, the Defendant's failure to object to his sentence on the grounds that the Sentencing Guidelines or procedures used to determine material sentencing facts were unconstitutional under *Apprendi* or on the grounds that material sentencing facts were not alleged in the Indictment, submitted to the jury or proved beyond a reasonable doubt, did not prohibit judicial review.

Both the Ninth and Tenth Circuit measured plain error against the standard enunciated in *United States v. Cotton*, 535 U.S. 625(2002). Of the four prongs discussed in *Cotton*, the Ninth and Tenth Circuits disputed whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings. The resolution of that dispute is found in the *Blakely* decision itself where this Court indicated the fairness dictated jury determination of sentencing disputes beyond a reasonable doubt and not by preponderance of evidence evaluations used by a District Court Judge.

Conclusion

For these reasons, Petitioner Sergio Duran Badilla respectfully requests this Court grant his Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 15th day of November, 2004.

John D. Kaufmann
Attorney for Petitioner

STATEMENT OF RELATED CASES

I hereby certify, that to Appellant's knowledge, the only case related to the above-captioned case is *Robert Acosta-Meza v. United States*, 367 F3d 1218(10th Cir. 2004) on Petition for Writ of Cert to the United States Court of Appeals from the Tenth Circuit.

Dated this 15th day of November, 2004.

John D. Kaufmann
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, **JOHN D. KAUFMANN**, attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

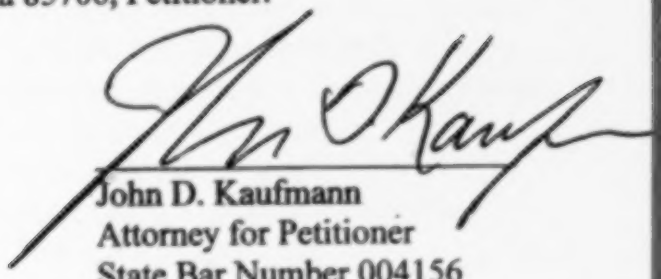
That in accordance with Rule 29.2, Supreme Court Rules, he has property deposited in a Federal Express facility, the original and forty (40) copies of Petitioner's **Petition For Writ Of Certiorari** to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules;

That in accordance with Rule 29.5, Supreme Court Rules, three (3) copies of this **Petition For Writ of Certiorari** have this 15th day of November, 2004, been mailed via United States Postal Service mail, first class postage prepaid to United States Attorney's Office, Norman Cairns, PO Box 607, Albuquerque, NM 87103;

Three (3) copies via United States Postal Service mail, first class postage prepaid to the Honorable Paul Clement, Solicitor General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington D.C. 20530;

One (1) copy via United States Postal Service mail, first class postage

prepaid to Sergio Badilla, #23111, FCI-Tucson, 901 S. Wilmot Road, Tucson, Arizona 85706, Petitioner.



John D. Kaufmann
Attorney for Petitioner
State Bar Number 004156

APPENDIX 1 – Opinion of Tenth Circuit Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 03-2183
v.	)	
	)	
SERGIO DURAN BADILLA,	)	
	)	
Defendant-Appellant.	)	

ORDER

Filed September 8, 2004

Before **SEYMOUR, HOLLOWAY** and **MURPHY**, Circuit Judges.

On the court's own motion, the previously filed order and judgment of August 12, 2004, shall be published. A copy of the published opinion is attached.

Entered for the Court
PATRICK FISHER, Clerk of Court

By:
Deputy Clerk

PUBLISH
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 03-2183
v.	)	
	)	
SERGIO DURAN BADILLA,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
For the District of New Mexico
(D.C. No. CR-02-1791-MV)

John D. Kaufmann, Attorney at Law, Tucson, Arizona, for Defendant-Appellant.

David N. Williams, Assistant United States Attorney (David C. Iglesias, United States Attorney, Norman Cairns, Assistant United States Attorney, on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **SEYMOUR, HOLLOWAY**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

Defendant-appellant Sergio Duran Badilla was indicted for knowingly and intentionally possessing more than one hundred kilograms of marijuana with intent to distribute in violation of 21 U.S.C. §841(a)(1) and (b)(1)(B) and 18 U.S.C. §2. Badilla was found guilty after a jury trial. He was sentenced to seventy-eight months' imprisonment and four years' supervised release.

Badilla appeals both his conviction and sentence. Exercising jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a), this court **affirms** Badilla's conviction and sentence.

II. BACKGROUND

Badilla was stopped at a permanent Border Patrol checkpoint in New Mexico. The checkpoint was approximately ninety-eight air miles from the New Mexico-Mexico border. Badilla was the sole occupant of a pick-up truck. Border patrol agent Pedro Antonio Reyes asked Badilla if he was the owner of the pick-up truck. Badilla responded that he was. Reyes noticed that the bed of Badilla's truck was unusually high and had been modified. Testimony at trial showed that the truck was unusually high and had been modified. Testimony at trial showed that the truck's bed and cab were lifted by approximately five inches, and that it was possible to tell that a lift kit had been installed by looking at the truck from the side. Badilla told Reyes that he had "not done anything to the truck."

Reyes asked for Badilla's consent to inspect the truck with his canine. Badilla said, "Sure, go ahead." The canine immediately alerted to the bed of the truck. Reyes looked under the bed of the truck to where the canine had alerted. Reyes noticed that the ed had been modified. Another agent lifted the bed liner and Reyes detected the odor of marijuana emanating from the truck's bed. Reyes found two hundred and seventeen kilograms of marijuana, wrapped in thirty-seven individual bundles, in a hidden compartment which ran along the length of the truck bed. The street value of the marijuana ranged from $119,515 to $310,739. Badilla had $1016 in cash when he was arrested.

Badilla moved to suppress the marijuana. The district court denied the motion. At trial, Badilla testified, under oath, that he did not know the marijuana was in the truck until he "was told [by the Border Patrol Agent], after the dog."

The district court instructed the jury as follows: "[w]ith respect to the question of whether or not a defendant knew that the controlled substance was present, you may – but are not required to – infer that the driver and sole occupant of a vehicle has knowledge of the controlled substance with it." (hereafter "Jury Instruction 8(f)").

Badilla objected to the Jury Instruction 8(f), arguing that it singled out one portion of the evidence and shifted the burden to him. The district court overruled that objection. The court also instructed the jury that: (1) it

must consider the jury instruction as a whole; (2) it should not assume that anything the judge said during trial expressed his opinion concerning the issues in the case; (3) it must arrive at its own fact findings; (4) it must consider all of the evidence; and (5) the government had the burden of proving Badilla's guilt beyond a reasonable doubt.

Over Badilla's objection, the district court adopted the Pre-Sentence Report's ("PSR") conclusion that Badilla lied on the stand when he testified that he did not know about the marijuana until he "was told, after the dog." The district court reasoned that "[y]ou just don't trust somebody with two hundred and seventeen kilograms of marijuana unless they're a trusted individual." As a consequence, the district court imposed a two-level increase to Badilla's base offense level for obstruction of justice pursuant to *United States Sentencing Commission Guidelines Manual* ("U.S.S.G.") §3C1.1.

III. DISCUSSION

A. Permissive Inference Jury Instruction

This court reviews a district court's decision to give a particular jury instruction for an abuse of discretion and considers the instructions as a whole *de novo* to determine whether they accurately informed the jury of the governing law. *United States v. Cota-Meza*, 367 F.3d 1218, 1221 (10th Cir. 2004). On review, this court merely determines whether the jury was misled by the instructions and whether it had an understanding of the issues and its duty to resolve those issues. *Id.*

This court must first decide whether the presumption in Jury Instruction 8(f) is permissive or mandatory. *Id.* Jury Instruction 8(f) is permissive because it makes clear that the jury *may* infer Badilla's knowledge of the marijuana from his sole possession of the vehicle. *Id.* It further states that the jury is not required to infer knowledge, thus leaving the jury discretion to determine the ultimate fact of guilt beyond a reasonable doubt independent of the interference. *Id.*

The district court did not abuse its discretion in giving Jury Instruction 8(f). A permissive inference instruction is valid if there is a rational connection between the fact that the prosecution proved and the ultimate fact presumed, and that latter is more likely than not to flow from the former. *Id.* at 1221-22. We judge that likelihood not in the abstract but as applied to the specific case in which the instruction was given. *Id.* at 1222. The totality of the evidence in this case supports an inference that Badilla knew of the marijuana's presence in the vehicle. Badilla owned the truck. The marijuana had an estimated street value of at least $119,515, making it unlikely that the owner of the marijuana would allow it to be stored and transported in a vehicle which is owned and driven by someone who had no knowledge of its presence. The five-inch lift of the truck's cab and bed was visible from outside the vehicle, making the hidden compartment readily discoverable by Badilla. The large volume and weight of the marijuana further supports the inference that Badilla knew of its presence within his

vehicle. On these facts, the inference of Badilla's knowledge of the hidden drugs is more likely than not to flow from the undisputed fact of his sole possession of the truck. Moreover, the instruction is consistent with Tenth Circuit precedent which allows the jury to infer that the driver of a vehicle has knowledge of contraband in the vehicle. *Id.* (citing *United States v. Levario*, 877 F.2d 1483, 1485-86 (10th Cir. 1989), *overruled on other grounds by Gozlon-Peretz v. United States*, 498 U.S. 395(1991)).

Jury Instruction 8(f) did not dilute the standard requiring proof beyond a reasonable doubt for conviction because, as demonstrated above, the jury could rationally make the connection permitted by the inference under the facts of this case. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 157(1979) (holding that a permissive inference instruction "affects the application of the beyond a reasonable doubt standard only if, under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference"). Likewise, the instruction did not impermissibly shift the burden of proof to Badilla.

A *de novo* review of the jury instructions as a whole shows that they accurately informed the jury of the governing law. The jury was instructed to consider the instructions as a whole. The other instruction clearly stated that the government had the burden of proving Badilla guilty beyond a reasonable doubt. The jury was instructed to consider all the evidence admitted at trial. The court charged that the jury should not assume that anything it said during

the trial expressed its opinion concerning any of the issues in the case. In this context, Jury Instruction 8(f) does not undermine the jury's ability to deliberate, does not prevent the jury from considering all evidence in the case, does not dilute the government's burden of proving guilt beyond a reasonable doubt, and does not shift the burden of proof to Badilla. *See Cota-Meza*, 367 F.3d at 1222.

Nevertheless, this court cautions, as it did in *United States v. Cota-Meza*, that permissive inference jury instructions run the risk of "encouraging the jury to convict on the basis of one damning fact without considering all of the other evidence." *Id.* As noted above, however, the other instructions largely dispelled any possibility of misunderstanding. Therefore, the district court's decision to use Jury Instruction 8(f) does not constitute an abuse of discretion in this case. Moreover, assuming, without deciding, that this Court has the authority to reverse Badilla's conviction on the basis of our supervisory power, we choose not to do so because Badilla's trial preceded this court's opinion in *Cota-Meza*.

B. Denial of Motion to Suppress

In reviewing the denial of a motion to suppress, this court looks at the evidence in a light most favorable to the government. *United States v. Patten*, 183 F.3d 1190, 1193 (10th Cir. 1999). The ultimate determination of reasonableness under the Fourth Amendment is reviewed *de novo*. *Id.*

Badilla argues that the marijuana should have been suppressed because it was obtained in violation of his Fourth Amendment rights. Badilla grounds this argument on the theory that he was unlawfully stopped at the Border Patrol checkpoint, and that the officers had no reasonable suspicion or probable cause to stop him otherwise. This argument is unavailing.

Badilla's Fourth Amendment rights were not violated by the stop at the Border Patrol checkpoint. Border Patrol agents can briefly detain vehicles in the absence of any individualized suspicion at reasonably located permanent checkpoints. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 562(1976). This court has held that a Border Patrol checkpoint located within one-hundred miles from the border is at a reasonable distance therefrom. *United States v. Anderson*, 468 F.2d 1280, 1282(10th Cir. 1972);[1]

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[1] Badilla requests that this court revisit its decision in *United States v. Anderson,* 468 F.2d 1280(10th Cir. 1972). Badilla argues that *Anderson*'s holding that one hundred air miles is a reasonable distance is "unconstitutional. . . . [because i]n the United States, approximately 80% of the population. . . live[s] within" one-hundred air miles from the borders. Our holding in *Anderson*, however, is consistent with the Code of Federal Regulations. *See* 8 C.F.R. §287.1(a)(2).

Moreover, the Supreme Court in *Martinez-Fuerte* noted that the Code of Federal Regulations in force4 at the time authorized Border Patrol agents to inspect vehicles for aliens within one-hundred air miles of the border. 428 U.S. 543, 553 n.8(1976). The *Martinez-Fuerte* Court was not troubled by the reasonableness of the one-hundred air mile distance enumerated in the applicable regulation. *Id.* On the contrary, the Court specifically mentioned that "[t]he choice of checkpoint locations must be left largely to the discretion of Border Patrol officials, to be exercised in accordance with statutes and regulations that may be applicable." *Id.* at 559 n.13. Therefore, we find Badilla's argument unavailing and decline the invitation to reconsider *Anderson.*

see also 8 C.F.R. §287.1(a)(2). Badilla was stopped at a checkpoint ninety-eight air miles from the border, which is within a reasonable distance. Therefore, the stop at the Border Patrol checkpoint was constitutional.

Once stopped, Badilla voluntarily consented to the canine sniff. A canine alert gives rise to probable cause to search a vehicle. *United States v. Rosborough*, 366 F.3d 1145, 1152(10th Cir. 2004). Reyes' canine alerted to the truck's bed. This provided probable cause for the subsequent search of the bed. *Id.* Thus, the marijuana was not obtained in violation of Badilla's Fourth Amendment rights. The district court did not err in denying his motion to suppress.

C. Sentencing Increase for Obstruction of Justice

This court reviews the district court's interpretations of the sentencing guidelines *de novo* and its factual findings for clear error. *United States v. Hawthorne*, 316 F.3d 1140, 1145(10th Cir. 2003). A factual finding is not clearly erroneous unless it has no basis in the record. *United States v. Martin*, 163 F.3d 1212, 1217(10th Cir. 1998).

The district court did not err in applying a two-level increase to Badilla's base offense level for obstruction of justice.[2] A district court can

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[2] On July 30, 2004, Badilla file a Motion for Post-Submission Consideration challenging the constitutionality of the two-level increase to his sentence. Badilla argues that the Supreme Court's recent decision in *Blakely v. Washington*, 124 S.Ct. 2531(2004), requires that the enhancement to his sentence be found beyond a reasonable doubt by a jury. Because Badilla ever

constitutionally enhance a defendant's sentence pursuant to U.S.S.G. §3C1.1 if, upon reviewing the evidence, it makes independent findings that establish a willful impediment or obstruction to justice. *United States v. Dunnigan*, 507 U.S. 87, 95(1993). A willful impediment or obstruction to justice occurs when the defendant gives false testimony under oath concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory. *Id. at 94.* A district court's findings regarding the obstruction of justice adjustment must encompass all of the factual predicates of perjury. *Hawthorne*, 316 F.3d at 1146. This circuit requires that the perjurious statement be identified, at least in substance. *Id.* The findings suffice if the elements of perjury are generally identified, in a line of questions and answers, such that this court is not forced to simply

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raised this issue before the district court, this court reviews it only for plain error. *See United States v. Cotton*, 535 U.S. 625, 629, 631(2002).

We conclude that Badilla's argument is unavailing. This court will correct an error not raised before the district court only if: (1) there is an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 631. Even assuming that there was an error that was plain, Badilla has failed to satisfy the fourth factor of the plain error analysis. The evidence that Badilla lied on the stand was overwhelming. To find Badilla guilty, the jury had to find that Badilla knew of the marijuana's presence in the vehicle before he "was told, after the dog." To reach this conclusion, the jury had to discredit Badilla's testimony to the contrary and therefore necessarily found that he lied on the stand. Under these circumstances, Badilla has failed to show that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See id.* at 633. Therefore, we decline to reverse Badilla's sentence under plain error review.

speculate on what the district court might have believed was the prejurious testimony. *See id.*

The district court made the requisite fact findings. At sentencing hearing, the government argued that: "defendant's testimony. . . when he was asked: 'When was the first time you realized there was marijuana in the truck you were driving?' And his answer was: 'When I was told, after the dog.'. . . this was false and [] it was material because it went to the essential element of knowledge, and it did not come as a result of confusion or mistake." The district court replied "I agree with you." The government's argument encompasses each of the three elements of willful impediment or obstruction to justice. It specifically identifies the perjurious statement. The district court's response clearly adopts the government's argument as its factual findings. Although it would have been advisable for the district court to enumerate the fact findings itself, we hold that, in this context, the court's adoption of the government's argument suffices.

The district court's finding that Badilla willfully committed perjury is supported by the record. Badilla's sole possession of a visibly modified truck containing marijuana of such high value, volume and weight supports the inference that he knew of the marijuana's presence in his vehicle before he "was told, after the dog." Therefore, the district court's finding that Badilla willfully gave false testimony under oath is not clearly erroneous. The false testimony concerned the material issue of Badilla's knowledge of the

marijuana's presence in his truck. Under these circumstances, the district court did not err in applying a two-level increase to Badilla's offense level pursuant to §3C1.1.

IV. CONCLUSION

For the foregoing reasons, this court **AFFIRMS** Badilla's conviction and sentence.

APPENDIX 2 – Jury Instructions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 02-1791 JC
v.	)	
	)	
SERGIO DURAN BADILLA,	)	
	)	
Defendant.	)	

COURT'S PROPOSED JURY INSTRUCTIONS

MEMBERS OF THE JURY:

You may now begin your deliberations.

Time:_____

Date:_____

_____

SENIOR UNITED STATES DISTRICT JUDGE

o

INSTRUCTION NO. 2

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

INSTRUCTION NO. 3

The indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving the Defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the Defendant.

While the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

INSTRUCTION NO. 4

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

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During the trial, I sustained objections to certain questions. You must disregard those questions entirely. Do not speculate as to what the witness would have said if permitted to answer the question. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

INSTRUCTION NO. 5

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

You should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that something is or is not a fact. The law makes no distinction between the weight you may give to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the Defendant's guilty beyond a reasonable doubt before the Defendant can be convicted.

INSTRUCTION NO. 6

I remind you that it is your job to decide whether the Government has proved the guilty of the Defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses, including the Defendant, who testified in this case. You should decide whether you believe what each person had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the Government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of the other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

The testimony of the Defendant should be weighed and his credibility evaluated in the same way as that of any other witness.

Your job is to think of the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than the other. Do not reach a conclusion no a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say.

INSTRUCTION NO. 7

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

INSTRUCTION NO. 7A

During the trial, you heard the testimony of experts who have expressed certain opinions. If scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, that soundness of the reasons given for the opinion, and all other evidence in the case.

INSTRUCTION NO. 8

You are here to decide whether the Government has proved beyond a reasonable doubt that the Defendant is guilty of the crime charged. The Defendant is no ton trial for any act, conduct, or offense not alleged in the Indictment. Neither are you concerned with the guilty of any other person or persons not on trial as a Defendant in this case.

INSTRUCTION NO. 8A

The defendant is on trial before you upon an indictment brought by the Grand Jury charging as follows:

On or about the 1st day of July, 2002 in Sierra County, in the State and District of New Mexico, the defendant, **SERGIO DURAN BADILLA,** did unlawfully, knowingly and intentionally possess with intent to distribute 100 kilograms and more of Marijuana, a Schedule I controlled substance.

In violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(B) and 18 U.S.C. §2.

First: That the offense of possession with intent to distribute marijuana was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the Defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

"To associate with the criminal venture" means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal's criminal venture.

"To participate in the criminal venture" means that the defendant engaged in some affirmative conduct designed to aid the venture or assisted the principal of the crime.

INSTRUCTION NO. 8B

You will note that the indictment charges that the offense was committed "on or about" a specified date. The Government does not have to prove that the crime was committed on that exact date, so long as the Government proves beyond a reasonable doubt that the crime was committed on a date reasonably near the date stated in the indictment.

INSTRUCTION NO. 8C

Title 21, United States Code, Section 841(a), makes it a crime for anyone knowingly or intentionally to possess a controlled substance with the intent to distribute it.

Marijuana is a controlled substance within the meaning of this law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a controlled substance,

Second: That the controlled substance was in fact marijuana;

Third: That the defendant possessed the substance with the intent to distribute it; and

Fourth: That the quantity of the substance was at least 100 kilograms.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

INSTRUCTION NO. 8D

Possession, as that term is used in this case, may be of two kinds: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

INSTRUCTION NO. 8E

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

INSTRUCTION NO. 8F

With respect to the question of whether or not a defendant knew that the controlled substance was present, you may – but are not required to – infer that the driver and sole occupant of a vehicle has knowledge of the controlled substance within it.

INSTRUCTION NO. 8G

With respect to the question of whether or not a defendant intended to distribute any controlled substance, you are instructed that the quantity of the controlled substance allegedly possessed by a defendant, if proved, may be considered by the jury in the light of all of the other evidence in the case in determining whether or not a defendant intended to distribute any such substance. Whether or not evidence of a particular quantity of substance shows an intent to distribute the same, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

INSTRUCTION NO. 8H

The word "knowingly" as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally.

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist. While knowledge no the part of the defendant cannot be established merely by demonstrating that the defendant recklessly disregarded the truth, or that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact tat otherwise would have been obvious to him. Stated another way, if a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance of knowledge in order to have a defense in the event of a subsequent prosecution.

INSTRUCTION NO. 8I

If the Defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

INSTRUCTION NO. 9

To reach a verdict, whether it is guilty, all of you must agree. Your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up you honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges - - judges of the facts. Your duty is to decide whether the Government has proved the Defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A form of verdict has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided, either guilty or not guilty. At the conclusion of your deliberations, the foreperson must date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson must write the message and give it to the marshal. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even the court, how the jury stands, numerically or otherwise until after you have reached a unanimous verdict.

(2)

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

No. 04-762

In the Supreme Court of the United States

SERGIO DURAN BADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-762

SERGIO DURAN BADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

DECEMBER 2004

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* The government waives any further response to the petition unless this Court requests otherwise.